Supreme Court, U.S.
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90-1843

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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May 30, 1991

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED FOR REVIEW

Do the federal courts lack power to review a State Court determination that federal law is inapplicable in an area such as group insurance plans governed by ERISA, where Congress has decreed that federal law both preempts state law claims and grants exclusive jurisdiction over ERISA to the federal courts; *i.e.*, is *Kalb v. Feuerstein*, 308 U.S. 433 (1940) no longer of any force, with the consequence that principles of *res judicata* are applicable even where a state court judgment infringes upon an area of exclusive federal concern?

LIST OF PARTIES

Pursuant to Rules 21.1(b) and 29.1, Petitioner states that the following parties appeared in the United States Court of Appeals for the Fourth Circuit:

a) Blue Cross and Blue Shield of Maryland, Inc.[1]

b) Robert Weiner, Sr.;

c) Mark Weiner;

d) Margaret Weiner; and

e) Robert Weiner, Sr., as Personal Representative of the Estate of Steven Weiner.

[1] Pursuant to Rule 29.1, the corporate affiliates of Blue Cross and Blue Shield of Maryland, Inc. are listed in Appendix E.

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RELEVANT STATUTORY PROVISIONS

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1132 and 1144 (1985).

§1132. *Civil Enforcement*

(a) *Persons empowered to bring a civil action*

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such

violations or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

. . . . .

(e) *Jurisdiction*

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

. . . . .

§1144. *Other laws*

(a) *Supersedure; effective date.*

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) *Construction and Application*

. . . . .

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

. . . . .

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

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PETITIONER

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER, AND
ROBERT WEINER, SR. as Personal Representative of the Estate of STEVEN WEINER,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Blue Cross and Blue Shield of Maryland, Inc. ("Blue Cross"), respectfully requests that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 925 F.2d 81 (4th Cir. 1991) (App. A hereto). The Opinion of the United States District Court for the District of Maryland, affirmed by the Fourth Circuit, is reported at 730 F. Supp. 674 (D.Md. 1990) (App. B hereto). The Opinion of the Florida Fourth District Court of Appeal, the subject of Blue Cross' federal collateral attack, is reported at 543 So. 2d 794 (Fla. Dist. Ct. App.), *review denied*, 553 So. 2d 1164 (1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990).[2]

JURISDICTIONAL STATEMENT

The Order of the United States Court of Appeals for the Fourth Circuit denying Blue Cross' petition for rehearing and suggestion for rehearing *in banc* was entered on March 1, 1991 (App. D hereto). Thus, pursuant to Rule 13.4, Blue Cross' filing of the instant Petition is timely. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATEMENT OF THE CASE

Robert Weiner, Sr. ("Weiner") purchased group health insurance for himself and his family, through a Florida association of gasoline retailers. Blue Cross underwrote this plan. The policy covered Weiner, his wife, and two dependent children, Steven and Mark. (App. A at 2.)

In 1982, Steven was found to have AIDS, and Mark was rendered a quadriplegic as the result of an automobile accident. (*Id.*) Benefits were paid under the policy for medical care until August, 1983, when they were stopped because Blue Cross believed that Steven and Mark were no longer

[2] The petition for *certiorari* filed for review of the Florida state court action did not relate to the issue now presented, *i.e.*, the propriety of collateral attack to protect fundamental federal interests subject to the exclusive jurisdiction of the federal courts.

covered. Weiner sued to compel continuation of benefits. Seven months later, Blue Cross resumed payments under the policy and reimbursed Weiner for omitted past payments. Since March of 1984, Blue Cross has complied with all contractual obligations under the policy. (App. A at 3.)

Nevertheless, the Weiners sued Blue Cross in a Florida state court, asserting fraud, negligence, and intentional infliction of emotional distress. In 1986, a jury returned a verdict against Blue Cross for over $5,000,000—*nearly all in punitive damages*. The trial judge awarded $1.4 million in attorney's fees (three times the lodestar). (App. A at 3.)

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), this Court held that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, preempted the common law tort claims of plan participants such as the Weiners. This Court did so in order to ensure uniform federal interpretation, that ERISA participants and plan beneficiaries would have ready access to federal courts, and that state court judgments would not destroy the goals of ERISA.[3] Thus, under ERISA, the state court could not have granted either the punitive damages or granted the excessive attorneys' fees, and there could have been no jury trial.

In holding that Congress sought "consistent regulation" and "limited remedies" in ERISA, 481 U.S. at 46, *Pilot Life* explained the "careful balancing" represented by ERISA's civil enforcement scheme:

> In sum, the detailed provisions of §502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the *public interest in encouraging the formation of employee bene-*

[3] ERISA provides a limited exception to exclusive federal jurisdiction in §1132(a)(1)(B) in actions solely for benefits—but the parties agreed that this section does not apply here. (App. B at 15.)

> *fit plans. . . . [T]he federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.*

Id. at 54 (emphasis added). This Court has repeatedly reaffirmed the comprehensive breadth of and the exclusive federal interest represented by ERISA. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. ____, 111 S.Ct. ____, 112 L.Ed.2d 474, 482-84, 486-87 (1990); *FMC Corp. v. Holliday*, 498 U.S. ____, 111 S.Ct. ____, 112 L.Ed.2d 356, 364-65, 368-69 (1990).

Blue Cross raised the ERISA issue—and thereby raised the lack of state court subject matter jurisdiction—for the first time in its appeal to the Florida state intermediate appellate court.[4] Blue Cross asked that court to dismiss the case for lack of subject matter jurisdiction or, at a minimum, to remand the case for a full evidentiary hearing as to whether the insurance plans were covered by ERISA. (App. A at 4.)

In 1989, the Florida intermediate appellate court affirmed the judgment as to Blue Cross (App. C). With respect to the newly raised ERISA issue, the Court acknowledged that the material facts were "disputed," but, in six sentences of its opinion, granted (in effect) summary judgment on appeal to the Weiners as to the issue of whether the plan was an ERISA plan. (App. C at 38.) *No federal court has ever ruled on that issue.*[5]

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[4] *Pilot Life* and *Metropolitan Life* were decided after the decision in the Florida trial court. The very broad reading of ERISA in those cases came as a surprise to many. *See Metropolitan Life*, 481 U.S. at 67 (Brennan, J., concurring).

[5] In 1988, *before* the decision by the Florida intermediate appellate court, Blue Cross filed suit in the United States District Court for the Southern District of Florida, asking that court to declare the state trial court judgment void because the causes of action had been preempted by ERISA, and the matter was one exclusively within the jurisdiction of the federal courts. That court abstained, in an unreported decision. Its deci-

When the Weiners sought to enforce their judgment in Maryland, Blue Cross removed the case and filed a motion to vacate and to hold an evidentiary hearing on whether the plan was covered by ERISA. The District Court denied relief (App. B). The Fourth Circuit, though assuming that an ERISA plan existed, nevertheless affirmed (App. A at 3-5).

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari Because the Decision of Court Below Effectively Overrules Kalb v. Feuerstein, and Renders Res Judicata Applicable Even Where A State Court Judgment Infringes Upon an Area of Exclusive Federal Concern.

Subject matter jurisdiction, once litigated, normally cannot be the basis of a collateral attack. *Stoll v. Gottlieb*, 305 U.S. 165, 173 (1938). A well-recognized exception to that rule arises, however, when a state court renders judgment in an area of important and exclusive federal concern. The exception has been recognized by this Court in *Kalb v. Feuerstein*, 308 U.S. 433 (1940) and *Durfee v. Duke*, 375 U.S. 106, 114 (1963), by the American Law Institute, and by leading scholars. Because ERISA is such an area, the present collateral attack should have been permitted to succeed.

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sion was affirmed (upon different grounds of abstention) in 868 F.2d 1550 (11th Cir.), *cert. denied*, 110 S.Ct. 239 (1989). The Eleventh Circuit decision also was rendered *before* the decision by the Florida intermediate appellate court. The Fourth Circuit opinion from which review now is sought comments that the Eleventh Circuit judgment was a "decision to abstain with respect to the same question with which we are presented." (App. A at 5.) *That statement is wrong.* The issue before the Eleventh Circuit was whether the federal courts should halt ongoing state litigation; here the issue is whether, after that litigation is over, the federal courts are *powerless* to correct a serious state court error infringing upon the strongest federal interests.

Nevertheless, in a bare page of legal analysis, the Fourth Circuit panel ignored all of that authority. Rather, it created a new rule—vouched for by no one and rejected universally—that permits collateral attack only in the non-existent situation in which the question of jurisdiction could be addressed *only* by a federal court. This new rule ignores the fact that any court has the initial right to pass on its own jurisdiction, including a state court in a matter of exclusive federal jurisdiction. This does not mean, however, that a state court's finding that it has subject matter jurisdiction is immune from collateral attack in federal court.

Collateral attack is necessary here to vindicate the extraordinary federal interest invested in ERISA. As a practical matter, under the decision below, even a state court judgment destroying IBM's pension plan would be insulated from collateral attack. The panel's opinion expressly assumes that the Florida decision on the ERISA issue was erroneous, but concludes that, even in these extreme circumstances, the federal courts have no power to permit collateral attack. This result surely is the death-knell for *Kalb* and for any doctrine that would permit collateral attack on an erroneous state court decision.

Even the authorities cited by the panel refute its conclusion. Thus, 13A Wright, Miller and Cooper, *Federal Practice & Procedure* (2d. ed. 1984), cited by the panel as recognizing its new distinction, instead does the opposite:

> [W]hen a federal statute has vested exclusive jurisdiction of a particular type of case in the federal courts, *the finding by a state court that it has jurisdiction over such a case will not preclude collateral attack* upon the judgment rendered in the state court.

Id. at §3536, pp. 539-40 (emphasis added). *Restatement (Second) of Judgments* §12(2) (1982) provides similarly that a judgment may be vacated on collateral attack if "[a]llowing

the judgment to stand would substantially infringe the authority of another tribunal or agency of government ."

Apart from this case, it has been universally thought true that when Congress mandates exclusive federal jurisdiction, a judgment resulting from a state's erroneous assumption of jurisdiction is "not merely erroneous but beyond its power, void and subject to collateral attack." *Kalb*, 308 U.S. at 439 (1940). The *Restatement (Second)* and *Wright, Miller and Cooper* reflect the widespread acceptance and broad interpretation of the *Kalb* rule. *No authority* accepts the contrived and illogical construction given *Kalb* by the Fourth Circuit panel (and its opinion cites none). Thus, *certiorari* is necessary and appropriate under Supreme Court Rule 10.1(c).

In *Kalb*, a state court had entered a judgment during pendency of a federal bankruptcy proceeding. A federal statute provided that the filing of the federal action deprived the state court of jurisdiction over foreclosure proceedings. Although the defendant had sought to stay neither the foreclosure nor the later enforcement proceeding, this Court permitted collateral attack on the state court decree, holding that it was immaterial whether the issue of subject matter jurisdiction had been fully litigated in the state court. 308 U.S. at 444.

Although decided after *Stoll*, *Kalb* did not follow the traditional rules of *res judicata*, because the case involved an explicit exercise by Congress of its power to regulate bankruptcy. That power included the authority to limit jurisdiction of state courts and to render judgments made beyond those limits "subject to collateral attack." *Id.* at 439. *Kalb* emphasized that Congress had intended to deprive the state courts of jurisdiction; the exercise of that power necessarily included the ability to deny preclusive effect to judgments made by state courts improperly asserting jurisdiction. *Kalb*, however, did *not* hold, as the panel would have it, that collateral attack is available only where a state court is

deprived of the right to decide *whether it has* jurisdiction—because no such circumstance exists.

Kalb saw nothing remarkable about treating jurisdictional foreclosure in the same breath as other federal rights—including federal substantive rights. Nor should it have; it should be axiomatic that federal rights can only be determined in the manner prescribed by Congress. That is why *Kalb* has been read broadly for a half century by judges and scholars. *See, e.g.*, Boskey & Braucher, *Jurisdiction and Collateral Attack*, 40 Colum.L.Rev. 1006 (1940) (this well-known article, assessing this Court's views after *Stoll* and *Kalb*, concluded that the implications of *Kalb* extended well beyond bankruptcy to include labor, burdens on commerce, suits against the military, sovereign immunity, and cases involving "*exclusive federal jurisdiction*". *Id.* at 1023-29) (emphasis added); *Developments in the Law: Res Judicata*, 65 Harv.L.Rev. 818, 853-54 (1952).[6]

Kalb is cited as an example of the appropriateness of collateral attack by the *Restatement (Second)* §12(2), but it is far from the only example. *See id.* at 127. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), involving sovereign immunity, is another example of the type of case referred to as appropriate for collateral attack under §12(2). Yet, a defense of sovereign immunity does not immediately oust the original court from jurisdiction to determine its own jurisdiction, to determine, in other words,

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[6] *Durfee v. Duke*, 375 U.S. 106 (1963), reiterates the general rule that determinations of subject matter jurisdiction are *res judicata*. But *Durfee*, citing *Kalb*, reaffirms expressly that "the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal preemption or sovereign immunity may in some contexts be controlling." *Id.* at 114. *Durfee*, of course, did not involve Congressionally mandated jurisdiction; no federal interests needed to be protected. The present circumstance is diametrically different. In *Durfee*, there were no policy considerations favoring departure from the general rule of finality; in the present case, the federal policy considerations under ERISA could not be stronger.

whether sovereign immunity exists. That issue (like the issue of whether an ERISA plan exists) must be litigated. Collateral attack is appropriate nonetheless because of the important federal interest infringed by a wrongful decision by the original court. The same argument obtains precisely with respect to ERISA and its exceptionally strong federal interest.

A close precedent is found in the decision by Judges Friendly, Wisdom, and Thomsen in *Consolidated Rail Corp. v. Illinois*, 423 F. Supp. 941 (Regional Rail Reorg. Ct. 1976), *cert. denied*, 429 U.S. 1095 (1977). It is cited by *Wright, Miller and Cooper*, *id.*, §3536 at 540, and demonstrates the breadth of the right of collateral attack (even beyond *Kalb*) where federal interests predominate. *Consolidated Rail cannot be distinguished in principle*; not surprisingly, Blue Cross emphasized it below, but neither of the lower courts even referred to it.

Consolidated Rail sued in the Special Railroad Court for relief from an injunction issued by the United States District Court for the Northern District of Illinois, which had restrained its operations under a trackage agreement. The Special Court, created under the Regional Rail Reorganization Act, held that the validity of the trackage agreement was a matter within its exclusive jurisdiction, and that *res judicata* did not bar a collateral attack on the jurisdictional issue. It reversed the holding of the Illinois federal court on the jurisdictional issue even though that issue had been *fully litigated* in that forum, 425 F. Supp. at 947 n.11. As is true here, the first court had the right to determine its own jurisdiction, and had done so; but the Special Court held that it could entertain a collateral attack when the decision of the first court was wrong. Distinguishing *Stoll*, it held:

> *The basic problem* presented is the extent to which litigated questions of subject matter jurisdiction are to be *protected from collateral attack*. Although the policies of terminating litigation, avoiding inconsistent

> results, and repose, which support application of res judicata to questions of subject matter jurisdiction, may vindicate the general rule that litigated questions of subject matter jurisdiction cannot be collaterally attacked, *the policy basis for the rule should make us wary of its procrustean application. Here, countervailing policy considerations* support the conclusion that Congress, in passing the Act and §209(e) in particular, intended to void determinations made by other courts, when these determinations were reserved for our exclusive consideration.
>
> *The legislative mandate overpowers the general rule.*
>
> *Kalb v. Feuerstein* is the leading decision for the principle that the legislature may void judgments. . . .
>
> *The exclusive jurisdiction sections [of the Rail Act] make clear that Congress desired that one court make these necessary determinations. It is not every challenge relating to the Act that Congress brought within our exclusive province* but only those where the critical nature of the determination demands the *consistent interpretation possible only when review is concentrated in a single court.* The ambit of the Special Court's exclusive jurisdiction was carefully considered by Congress. Congressional concern focused on providing for exclusive jurisdiction to *oust* problems which could be effectively dealt with by other courts.
>
> *The assumption was then that certain matters would be exclusively attended to by the Special Court, and congressional efforts were directed to determining which matters warranted sensitive treatment .*
>
> In sum, the purposes of the Act and the language of the Act compel us to hold that Congress concluded that the policies supporting our exclusive jurisdiction outweigh the policies of res judicata.

423 F. Supp. at 947-50 (emphasis added; footnotes omitted).

The decision to allow collateral attack turned in part on the Congressional goals of "consistent interpretation" and avoidance of impediments to the "effective implementation of the Act." *Id.* at 948-49. Similarly, in ERISA, Congress bal-

anced protection of employees with avoidance of ruinous punitive damage state court litigation (and the resulting exorbitant insurance costs), which would prevent businesses from adopting employee benefit plans. *Pilot Life*, 481 U.S. at 54. This case demonstrates the wisdom of that concern.

The Fourth Circuit opinion does assert that "commentators are assiduously careful to make the very same distinction" made by the panel (App. A at 5), citing 13A Wright, Miller, and Cooper §3536 n.12. *But that reference simply is wrong.* Footnote 12 merely quotes §12 of the *Restatement (Second)* (which *rejects* the panel's position), and refers generally to an obscure law review article published before the *Restatement (Second)*, the view of which has been rejected by that work.[7]

This rejection of the panel's analysis by the leading authorities is logical. A court (including the Florida state court in this case) has—and must have—the right to determine its own jurisdiction; otherwise our legal system would face gridlock. Thus, if Cardozo sues the Holmes Law Book Company in state court, and Holmes Law Book Company files a Chapter 11 petition, the state court still would have to decide if it has jurisdiction to proceed. The state court might be called upon to decide if it is the same Holmes Lawbook

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[7] The Wright, Miller and Cooper text reads: "When a federal statute has vested exclusive jurisdiction of a particular type of case in the federal courts, the finding by a state court that it has jurisdiction over such a case will not preclude collateral attack upon the judgment rendered in the state court." *Id.* at 539-40. That the treatise does not agree with the panel is made clear by the text following footnote 12, and by footnote 13, which refers for support to *Kalb* and *Consolidated Rail*—both of which reject the panel's view.

The Fourth Circuit also sought support from *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 393 (1986), which it cites, with a "Cf", as "flatly distinguishable" from *Kalb* (App. A at 5). But this Court, in discussing the right of collateral attack on the same page as that cited by the panel, held that "this case [*Davis*] is in all relevant aspects *the same as Kalb*." *Id.* at 393 n.11 (emphasis added). That is a fair measure of the magnitude of error by the Fourth Circuit.

Company or perhaps a Holmes Law Book Company incorporated in another state. If the state court is wrong, however, the Supremacy Clause and *Kalb* make clear that the error can be corrected in federal court.

CONCLUSION

Recently, in *Ingersoll-Rand*, this Court recognized the danger of approval of erroneous state court determinations which threaten the overwhelming federal interests embodied in ERISA:

> Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a). Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

112 L.Ed.2d at 486.

For a half century it has been settled doctrine that a state court cannot bootstrap itself into subject matter jurisdiction over federal issues which Congress has reserved for the exclusive jurisdiction of federal courts. So important is this rule, and so vital is it to the effective working of our federal system, that the normal rules of preclusion do not prevent collateral attack. Professor Robert Leflar, the great conflicts scholar, has explained:

> No appearance and no amount of litigation . . .will give effectiveness to a judgment by a court that had no competence to hear the type of lawsuit in which the judgment was rendered. Thus, parties cannot by

> appearing before a state court "bootstrap" it into jurisdiction over a federal matter.

Leflar, McDougal and Felix, *American Conflicts Law*, §79 at 235, 238 (4th ed. 1986).

That view of *Kalb* has been the view of scholars. Great judges have read *Kalb* similarly. No court has held that an admittedly erroneous decision of a state court is entitled absolutely to preclusive effect even where Congress has mandated that the subject matter of the dispute is within the exclusive jurisdiction of the federal courts. No court has created—let alone accepted—the artificial limit on *Kalb* adopted by the Fourth Circuit, a distinction which, if approved, would seriously damage the doctrine of Federal Supremacy, and would radically alter the relationship between federal and state courts in cases where Congress has mandated both preemption of state law claims and exclusive federal jurisdiction. *Certiorari* should be granted to review the decision in this case.

Dated: May 30, 1991

Respectfully submitted,

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CERTIFICATE OF SERVICE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

1. I am one of the counsel for Petitioner.

2. I hereby certify that, on this May 30, 1991, two copies of the Petition for a Writ of Certiorari were served by mail, postage prepaid, upon Larry S. Stewart, Esquire, Suite 1900, 44 West Flagler Street, Miami, Florida 33130, counsel for Respondents.

Allan P. Hillman